(30,982)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1925

# No. 331

CLARENCE A. ANDERSON

*vs.*

JAMES W. CLUME

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Certificate from the United States circuit court of appeals, ninth circuit | 1 | 1 |
| Statement of facts | 1 | 1 |
| Questions certified | 3 | 2 |
| Judges' signatures | 3 | 2 |
| Clerk's certificate | 4 | 3 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 21, 1925

[fol. 1] **IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 4370

CLARENCE A. ANDERSON, Appellant,

vs.

JAMES W. CLUNE, Appellee

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code

Before Ross, Hunt, and Rudkin, Circuit Judges

STATEMENT OF FACTS

This suit came to the Circuit Court of Appeals for the Ninth Circuit by appeal from the United States District Court for the Southern District of California, Southern Division, from a decree in favor of James W. Clune, plaintiff in the District Court, and against Clarence A. Anderson, defendant in the District Court. The suit is to have Anderson adjudged to be a trustee of certain lands for Clune. The complaint charged that A. K. Johnson, who was an honorably discharged soldier of the Civil War, in 1872 made a homestead entry for a certain tract of land described, containing approximately eighty acres under the homestead laws of the United States; that Johnson died in May, 1875, leaving a widow, who died on March 1, 1917, without disposing of her husband's additional homestead right; that Johnson also left four children, all of whom were over the age of [fol. 2] twenty-one years at the date of the death of the widow; that there was also a widow of a deceased son; that they sold and assigned unto one B. A. Mason the additional soldier's homestead right of the deceased soldier, their several assignments having been made, respectively, one October 22, 1922, one January 16, 1923, two January 19, 1917, one September 15, 1922; that the two who assigned on January 19, 1917, reassigned their rights on July 9, 1923. It is alleged that Mason thereafter sold and assigned the said additional homestead right to the extent of 20.49 acres to Clune, plaintiff in this suit, who, in turn in August, 1922, by virtue of the said assigned soldier's homestead right, filed upon and entered a certain described tract of public lands in the United States Land Office at Independence, California; that the filing and entry of Clune were held for rejection in the Land Office and were finally rejected by the General Land Office on November 14, 1923, on the ground that the assignment of the soldier's additional homestead right had not been made by the soldier or his widow or his heirs prior to the administrative

ruling of the Department of the Interior February 15, 1917, (46 L. D. 32) and rulings and decisions of the Land Office, which construed sections 2306 and 2307 of the Revised Statutes as limiting a soldier's additional homestead right to the exercise thereof (1) by the soldier himself entering the land, or indirectly by conveying his right to entry to an assignee during his lifetime; (2) by the widow while her status as widow of the soldier continued; (3) in the absence of appropriation by the soldier or his widow, then by the minor orphan children during their minority acting through their guardian. It is further alleged that about October 27, 1923, defendant Anderson filed upon said 20.49 acres under an assignment of the additional homestead right of one G. M. Dunn, a former soldier of the United States; that Anderson's filing and application were allowed in 1924, [fol. 3] and that final certificate and patent for said tract have been issued to him by the authorities of the United States; that Anderson filed on the tract with full knowledge that Clune had made entry thereof and was claiming the land under his prior entry. The complaint also alleged that the decisions of the courts of the United States and of the Department of the Interior for many years were that the additional homestead rights to enter lands under sections 2306 and 2307 of the Revised Statutes of the United States are property and assignable and inheritable and have become vested in the estates of the soldier claimants, and have established a rule of property, and that the administrative ruling of February 15, 1917, (above cited) of the Department of the Interior is in violation of the Fifth Amendment of the Constitution of the United States.

Defendant Anderson moved the District Court for a dismissal of the complaint for the reason that it did not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant. The motion was denied; defendant failed to answer, and decree, holding Anderson to be a trustee for Clune for the 20.49 acres referred to, was entered.

## Questions Certified

The questions of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court are:

1. Under the Revised Statutes of the United States, sections 2306 and 2307, is a soldier's additional homestead right limited to the exercise thereof by the soldier himself entering the land, or indirectly by transfer of his right to an assignee during his lifetime, and to his widow while her status as widow of the soldier continues, and in the absence of the appropriation by the soldier or his widow during their lives, then by his minor orphan children during their minority acting through a guardian?

(Signed) Erskine M. Ross, William H. Hunt, Frank H. Rudkin.

## Clerk's Certificate

[fol. 4] (Endorsed:) Certificate certifying certain questions or propositions of law to the Supreme Court of the United States under Section 239 of the Judicial Code. Filed February 24, 1925.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

A true copy.

Attest February 24, 1925.

F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. (Seal of the United States Circuit Court of Appeals, Ninth Circuit.)

## SUBJECT—INDEX.


PAGE

Statement of Case..... 3
Specification of Errors..... 5
Argument ..... 5

Cases and Statutes Cited:

Circular of Feb. 15, 1917, 46 L. D. 32 ..... 6
Corbet v. Wood, 32 Minn. 509..... 6
Joiner v. Co., 107 Fed Rep. 597..... 6
Sanford v. King, 19 S. D. 334..... 7
U. S. Rev. Stats., Secs. 2306-7.....3, 6
Wiscom v. Eastman, 21 Wash. 163..... 7

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

---

Clarence A. Anderson,
*Appellant,*

*vs.*

James W. Clune,
*Appellee.*

---

## APPELLANT'S BRIEF.

---

### Jurisdiction.

The action was brought by appellee to declare the appellant a trustee for appellee, of California land of the value of over $3000, upon the ground that the U. S. Land Department had, through a mistake of law, wrongfully issued patent therefor to the appellant instead of to the appellee; the mistake of law consisting in an alleged erroneous construction of U. S. Rev. Stats 2306-7.

The District Court denied the defendant's motion to dismiss, urged upon the ground that the complaint did not state a cause of action.

Upon appeal, the Court of Appeals of the Ninth Circuit, certified the questions involved to this court, under Section 329 of the Judicial Code.

## Statement.

The appellee brought this action to have the appellant declared trustee for him of the legal title to 20.49 acres of land entered by the appellant at the United States Land Office in Independence, California, patent upon such entry having been thereafter issued to the appellant. [Record p. 2.]

The appellee based his equitable right to this land upon the fact that prior to the appellant's filing upon it the appellee had himself filed thereon under a soldier's additional homestead right assigned to him by the heirs of a deceased soldier, Amory K. Johnson; but the United States Land Office held the appellee's filing and entry for rejection, and finally on November 14, 1923, rejected the same for the reason that the assignment to appellee of the deceased soldier's homestead right had not been made prior to the administrative ruling of the Department of the Interior dated February 15, 1917, Circular No. 528 (46 L. D. 32) which undertook by construction of U. S. Rev. Stats., Secs. 2306 and 2307, to limit a soldier's additional homestead right to the exercise thereof (1) directly by the soldier himself entering the land or indirectly by his transferring his right during his lifetime to an assignee, (2) similarly to his widow while she remained his widow and in her lifetime, (3) and in the absence of such exercise by the soldier or his widow during their lifetime, then similarly to his minor orphan children during their minority through a guardian. [Record pp. 1 & 2.]

The appellant moved to dismiss appellee's complaint setting up the foregoing facts, upon the ground that it failed to state facts sufficient to constitute a cause of

action; the motion was denied; appellant electing to stand upon his motion, judgment was entered against him as prayed for, appeal was taken therefrom, and the Court of Appeals (Ninth Circuit) certified the case to this court under Section 239 of the Judicial Code, setting forth the foregoing facts in its certificate. [Record p. 2.]

The question involved is whether the Land Department has erred in its construction of the law with reference to the assignability of soldiers' additional homestead rights.

## Specification of Errors Relied Upon.

The appellant specifies as error the action of the lower court (1) in denying his motion to dismiss the complaint, and (2) in entering judgment in favor of the appellee.

## Brief of Argument.

1. It is true that the Federal Supreme Court and inferior courts of the United States in a number of decisions have held that these soldiers' additional rights are assignable, but these decisions all relate to rights held by the soldier, his widow or his minor heirs, and none of them hold that said rights are inheritable. While the General Land Office did up to 1917 hold them to be inheritable, and hence assignable by the heirs generally, or the administrator, it has now discovered its error in such rulings and declares these rights are not inheritable and hence not assignable; in other words that they are not property at all, but powers dying with the donee. A careful reading of the sections of the statutes

involved should convince the court of the correctness of the rule of the General Land Office as now declared.

> "Every person entitled, under the provisions of Section 2304 to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."
>
> U. S. Rev. Stats., Sec. 2306.

> "In case of the death of any person who would be entitled to a homestead under the provisions of Section 2304, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; and if such person die during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title."
>
> U. S. Rev. Stats., Sec. 2307.

2. Appellant is content to depend on the reasoning of the Secretary of the Interior as set forth in the circular of Feb. 15, 1917, Circular No. 528 (46 L. D. 32).

3. It is a well settled rule that the decisions of the Land Office upon all issues presented for its consideration are presumably right.

> Corbet v. Wood, 32 Minn. 509;
> Joiner v. Company, 107 Fed. 597.

4. If the Secretary of the Interior has been in error in former decisions relative to the meaning of a statute,

it is always competent for him to correct the rule unless former titles obtained under an erroneous interpretation are upset.

5. A decision of the Land Office in a contest should be sustained by the courts unless there are clear and cogent reasons for overturning it.

Sanford v. King, 19 S. D. 334;
Wiscom v. Eastman, 21 Wash. 163.

BURGESS W. MARSHALL,
*Attorney for Appellant.*

Washington, D. C.

## SUBJECT INDEX.


PAGE

Statement ..... 3
Question Involved in District Court..... .... 4
Question Submitted to this Court..... ..... 4
Construction of the Statute Prior to 1896..... 6
Webster v. Luther..... 11
Administrative Ruling ..... 17
Error of Administrative Ruling..... 20
Stare Decisis ..... ..... 21
Conclusion ..... 24

## CASES AND STATUTES CITED.


PAGE

Atwood v. Beck, 21 Ala. 590.....
Barnes v. Porier, 27 U. S. App. 500.....9, 12, 23
Blandon v. U. S., 213 Fed. 322..... 13
Brayton, H. E., 31 L. D. 443..... 14
Brick Co. v. McKnight, 233 U. S. 250..... 4
Clark v. Welch, 154 Mich. 537..... 13
15 C. J. 915..... 21
32 Cyc. 1060..... 4
Diamond Coal Co. v. U. S., 233 U. S. 243..... 13
Ferris v. Carver, 11 Cal. 175..... 22
Fisher v. Horicon, 10 Wis. 293..... 22
Hasket v. Maxkey, 134 Ind. 182..... 22
Herrod v. Meyers, 21 Ark. 592..... 20
Jenkins, Williford, 29 L. D. 510..... 14
Knight v. Leary, 54 Wis. 459..... 11
46 L. D. 32..... 17
Laughlin, Allen, 31 L. D. 256..... 15
Lawrence, Julia A., 29 L. D. 658..... 15
Lonstorf v. Lonstorf, 118 Wis. 159..... 22
Mason, John H., 41 L. D. 361..... 15
Montague v. McCarroll, 10 Utah 22..... 11
Montgomery v. Pac. Co., 94 Cal. 284.....8, 11
Mullen v. Wine, 26 Fed. Rep. 206.....7, 11
Pardoe v. Merritt, 75 Minn. 15..... 9
Pound, Earl C., 43 L. D. 205..... 16
22 R. C. L. 278..... 4
Rogers v. Clark Iron Co., 104 Minn. 198..... 14
Rose v. Nev. Land Co., 73 Cal. 385.....8, 11
Sharp, Fidelo C., 35 L. D. 164..... 16
U. S. ex rel. Rule v. Lane, 42 Wash. Law Rep. 70..16, 22
U. S. v. Laughlin, 249 U. S. 440..... 4
U. S. v. Alabama R. R. Co., 142 U. S. 615..... 22
Walter, Jno. W., 10 L. D. 354..... 6
Webster v. Luther, 163 U. S. 331.....8, 11, 13, 18

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

No. 331.

October Term, 1925.

Clarence A. Anderson,
*Appellant,*

*vs.*

James W. Clune,
*Appellee.*

## APPELLEE'S BRIEF.

### STATEMENT.

The assignment of the soldier, Johnson's, additional homestead right, was made to the plaintiff and appellee after the death of the soldier and after the death of his widow, neither of whom had exercised the right: it was made by the heirs of the soldier after they had attained their majority, and after the administrative ruling of the Department of the Interior dated February 15, 1917.

[Record p. 1.] Had the assignment been made before the date of this ruling, it would, under the terms of the ruling itself, have been allowed. (Two of the soldier's children first assigned their rights prior to the date of the administrative ruling, but the widow of the soldier was then living; consequently their assignments were invalid, and new assignments were taken from them after the widow's decease, which was after the date of the administrative ruling.)

**Question Involved in District Court.**

The question in the District Court was whether the Land Department erred in its construction of the statute or disregarded the law in making its determination that this assignment to plaintiff and appellee was void, and that appellant instead of appellee was entitled to a patent for the land in controversy. If the department erred, as the District Court held, then the appellant was properly held by that court as trustee of the legal title for the appellee.

U. S. v. Laughlin, 249 U. S. 440;
Brick Co. v. McKnight, 233 U. S. 250;
32 Cyc. 1060;
22 R. C. L. p. 278.

**Question Submitted to This Court.**

The question submitted to this court by the Circuit Court of Appeals is: "Under the revised statutes of the United States, sections 2306 and 2307, is a soldier's additional homestead right limited to the exercise thereof by the soldier himself entering the land, or indirectly by

transfer of his right to an assignee during his lifetime, and to his widow while her status as widow of the soldier continues, and in the absence of an appropriation by the soldier or his widow during their lives, then his minor orphan children during their minority acting through a guardian?" [Record p. 2.]

Revised Statutes U. S., sections 2306 and 2307, are as follows:

> "Every person entitled, under the provisions of section 2304, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."
>
> U. S. Rev. Stats., Sec. 2306.

> "In case of the death of any person who would be entitled to a homestead under the provisions of section 2304, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions of settlement and improvement therein contained; but if such person die during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title."
>
> U. S. Rev. Stats., Sec. 2307.

The foregoing sections were originally adopted by the Act of April 4, 1872 (17 Stat. 49) and amended by the Acts of June 8, 1872 (Id. 333), and March 3, 1873 (Id. 605).

**Construction of the Statute Prior to 1896.**

From the enactment of the statute until 1896, it was construed by the Land Department as limiting the exercise of the right personally to the soldier or sailor, his widow, and minor children.

> "Congress did not intend the privilege granted to the soldier * * * should be made the subject of barter and sale or of assignment to another. In my judgment the right thus conferred is strictly a personal right." "It is, under the statute, essentially a personal right, which becomes or ripens into a right of property only when it is exercised by the soldier through his *personal* entry of a specific tract of public land. It is not such a right as by the natural law of descents can descend to the heirs, but is a mere personal right which lapses or becomes extinct upon the death of the party upon whose personality it depends. Nor can it be made the subject of devise or bequest by will. There is nothing in the mere right, unexercised, that can descend, independently of the statute, or that can be devised or bequeathed."
>
> John M. Walker, 10 L. D. 354 (March 1890).

Nevertheless, under the Departmental Circular of May 17, 1877, the practice was permitted of certifying the additional right by the department, and upon presentation of such certificate with a proper application either by the party entitled or his agent or attorney, the same was accepted and entry thereunder allowed; thus in effect permitting an assignment of the right.

Do. p. 359.

This practice was expressly discontinued in the Departmental Circular of February 13, 1883, which held:

"The right granted by this section (U. S. Rev. Stats. Sec. 2306) and extended by section 2305 (2307), to the widow if unmarried, or otherwise to the minor orphan children by proper guardian, is a *personal* one and is not transferable or subject to assignment nor lien, nor can it be exercised by another. It can lawfully be exercised only by the soldier or sailor, or by the widow or guardian, as the case may be, in his or her own proper person."

This circular reserved the exception:

"These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883."

Circular U. S. L. O. Feb. 13, 1883, 1 L. D. p. 564.

Under this construction by the Land Department a soldier's additional right was limited to the soldier himself, to his widow while unmarried, and to his minor orphan children, without any right of assignment.

But this construction of the Land Department was not concurred in by the courts.

In Mullen v. Wine, 26 Fed. Rep. 206 (Jan. 1886), Judge Brewer held that a soldier's additional right was personal property and could be sold before entry of the land.

"It was a mere right of selection and taking. Like all property it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. * * * When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet why should the right to sell exist after entry and not before? Congress has placed no restriction,—who may? * * * In view of

> what has been done, Congress makes this gift. It places no restrictions on the donee but leaves him to use the gift as he sees fit. Why may he not sell it? I see no satisfactory reason to the contrary."

In Rose v. Nevada Land Co., 73 Cal. 385, decided in September, 1887, the court held that under the United States statutes in question, occupancy was not required and that the right of alienation existed if not expressly prohibited or opposed to public policy.

Montgomery v. Pac. Co., 94 Cal. 284, decided in April, 1892, approved and followed Rose v. Nevada Land Co.

Montague v. McCarroll, 10 Utah 22, in March, 1894, held a soldier's additional homestead right was assignable before entry.

Webster v. Luther, 50 Minn. 77, was decided in May, 1892, and later affirmed by the United States Supreme Court. In this case the widow of a soldier entitled to an additional homestead, on April 28, 1880, gave a power of attorney to sell and convey the land she might obtain under her right and at the same time assigned and released to him the proceeds of any such sale. On April 7, 1887, her application was filed to enter the land in controversy and on that date receiver's final receipt was issued to her. On the same date her attorney in fact conveyed the land to the defendants. Plaintiff claimed the land under a quit claim deed to him from the widow executed October 17, 1890. Judgment was entered for the defendants that they had the title. Counsel for appellant urged the practice of the Land Department and the construction placed by it upon the right as being personal and non-assignable. The court said:

"That the right given by the statute referred to is in the nature of property, whatever restrictions Congress from motives of policy may have put upon it, cannot be doubted; and as such it is subject to the full power of the owner to dispose of it unless that power is expressly or impliedly limited."

The court concludes the right

"was a mere gratuity; there was no purpose but to give it as a sort of compensation for the party's failure to get the full quota of 160 acres by his first homestead entry. There is no reason to believe it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee."

This case was followed in:

Whiteside v. Rutan, 53 Minn. 520 (June 1893);

Bradley v. Whiteside, 55 Minn. 455 (Dec. 1893);

Turman v. Pillsbury, 60 Minn. 520 (Apr. 25, 1895);

Pardoe v. Merritt, 75 Minn. 12 (Dec., 1898);

Gilbert v. McDonald, 94 Minn. 289 (Feb. 1905).

In Barnes v. Poirier, decided in October, 1894 (27 U. S. App. 500, 69th Fed. 14, C. C. A. 8th), Judge Sanborn said:

"Is the right to land additional to a homestead granted by section 2306 of the Revised Statutes assignable before the additional land is entered? This is the only question it is necessary to decide in this case." "Restrictions upon alienation are not favored by the law. * * * The modern rule is that one may do what he will with his own unless prohibited by a positive statute or restrained by manifest public policy."

The court quoted the provision of the original statute as amended on June 8th, 1872, whereby a soldier or sailor was "permitted to enter *under the provisions of this act* so much land *contiguous to the tract embraced in the first entry as,*" etc., and the amendment of March 3, 1873, whereby the phrases "Under the provisions of this act", and "contiguous to the tract embraced in the first entry" were eliminated from the statute, and cited the provisions of the original Homestead Act with reference to non-alienation, concluding that the purpose and policy of the original Homestead Act "were the very opposite of those which inspired that in section 2306." "The beneficiary of the grant under section 2306 had already selected, settled upon, cultivated and acquired his homestead from the public domain and was presumably in the occupation of it before that grant was made. The purpose of the grant under that section surely was not to induce him to abandon his homestead and make a new settlement on the new grant. It was rather to reward him for the services he had already rendered as a soldier in suppressing the rebellion and as a farmer in establishing his home upon, cultivating and occupying that portion of the public domain he had already entered as his homestead. Hence it was that no settlement, no cultivation, no occupation, no affidavit of non-alienation, no affidavit at all was made a condition precedent to the enjoyment of the benefits of this grant or to the entry of the additional land under this section."

The court then proceeds:

> "It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee,"

and continues as quoted by this court in Webster v. Luther, post, citing Knight v. Leary, 54 Wis. 459; Mullen v. Wine, 26 Fed. 206; Rose v. Nev. Land Co., 73 Cal. 385; Montgomery Co. v. Pac. Co., 94 Cal. 284; Webster v. Luther, 50 Minn. 77; Montague v. McCarroll, 10 Utah 36, Pac. 50, in support of his views, concluding:

> "This course of judicial decision ought not to be reversed, the titles to the lands conveyed on the faith of it ought not to be disturbed and the inevitable litigation concerning them that must follow such a reversal ought not to be invited unless the decisions to which we have referred were clearly erroneous. In such case it is sometimes more important that the law should be settled and certain than that it should be technically right." "But we are satisfied for the reasons stated in the earlier part of this opinion that the early decisions to which we have adverted were undoubtedly right."

**Webster v. Luther.**

While the Land Department and the courts were thus in dispute, the former holding that the statute created a power merely, a right personal to the soldier himself, his widow or minor orphan children, and while the courts were construing the statute as creating a property right, "an unfettered gift in the nature of compensation for past services," the case of Webster v. Luther, on appeal from Minnesota, was decided by this court in May, 1896 (163 U. S. 331). The decision referred to the amendment of June 8, 1872, which required a soldier's additional entry to be "contiguous to the tract embraced in the first entry," and to be made "under the provisions of this act," and to the later amendment of March 3, 1873, eliminating these two requirements; the

court reasoned in this case that this amendment of March 3, 1873, clearly shows that it was in the mind of Congress to make these rights property, i. e. "as valuable as possible"; for manifestly if the statute grants only a power, not one soldier in a thousand would care to make use of it, for who would leave the homestead he had and go into distant parts, as would generally be necessary, to take up another? To construe the right as a power merely, would destroy its value utterly; the court then proceeded:

> "If Congress did not intend to burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restrictions and consequently there was no purpose to interfere with the disposition by the homesteader of such additional lands or of his interest in them in any mode he deemed proper or that might be adopted in respect to other property owned by him."

The court then cited Barnes v. Poirier (8th C. C. A., *supra*) as holding that the right was assignable before entry and quoted from it as follows:

> "It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. Any restriction upon its alienation must decrease its value."

The court concluded:

> "Much stress is placed by plaintiff in error upon the practice of the Land Department during a certain period based upon the idea that the right of

entry given by the statute of additional lands was entirely personal and not assignable or transferable. We cannot give to this practice the effect claimed for it by the plaintiff in error. In the present case it is our duty to adjudge that the right given by the statute in question to enter additional lands was assignable and transferable."

Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. Rep. 963, affirming S. C. 50 Minn. 77, 55.

Webster v. Luther is cited approvingly or followed in:

Robinson v. Lundrigan, 227 U. S. 173;
Diamond Coal Co. v. U. S. 233, U. S. 243;
U. S. v. Poland, 251 U. S. 221, 64 L. Ed. 237;
Blandon v. U. S. 213 Fed. 322;
Clark v. Welch, 154 Mich. 537;
Pardoe v. Merritt, 75 Minn. 15;
Rogers v. Clark Iron Co., 104 Minn. 198.

In U. S. v. Poland, *supra* (decided in January, 1920), Mr. Justice Van Devanter, referring to soldier's additional homestead rights, said:

"They are not personal to the original beneficiaries, but are transferable at will, and the number that may be assigned to the same person is not limmited. A single right is always for less and generally much less than 160 acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon use of such rights outside Alaska."

In Clark v. Welch, *supra* (1908), the Supreme Court of Michigan held that a soldier's additional right is "assignable before entry, the practice of the Land Department based upon the idea that the right of entry

given by the statute was personal and not assignable notwithstanding."

In Rogers v. Clark Iron Co., 104 Minn. 198 (May, 1908), in an action to quiet title the court held: "Soldiers' homestead scrip is personal property and assignable", that it does not die with the grantor or assignor, and vests title in the assignee as soon as located and before patent issued; quoting from Webster v. Luther.

**Decisions of the Department Following Webster v. Luther.**

Following the decision of this court in Webster v. Luther, the Land Department reversed its former holdings, fell in line with the decisions of the courts, and for a period of over twenty years, without exception, held that a soldier's additional homestead right was property and both assignable and inheritable.

Williford Jenkins, 29 L. D. 510 (Feb., 1900);
Julia A. Lawrence, 29 L. D. 658 (Apr., 1900);
Allen Laughlin, 31 L. D. 256 (Feb., 1902);
H. E. Brayton, 31 L. D. 443 (Dec., 1902);
Fidelo C. Sharp, 35 L. D. 164 (Sept., 1906);
U. S. *ex rel.* Rule v. Lane, 42 Wash. Law Rep. 70;
John H. Mason, 41 L. D. 361 (July, 1912);
*Re* Earl C. Pound, 43 L. D. 205 (March, 1914).

In the Williford Jenkins case, 29 L. D. 510, *supra*, it is said:

> "It must therefore be held, in accordance with the act of Congress granting the right to make soldier's additional entry, that in case the soldier en-

> titled to the right, but without having exercised it, dies leaving no widow, or minor orphan children, the right of entry vests in his personal representative as personal property."

In Julia A. Lawrence, 29 L. D. 658, *supra,* the department says:

> "The right to make a soldier's additional entry, if not exercised by the soldier, becomes an asset of his estate, if there be no widow or minors." "The right to enter additional land conferred by Sec. 2306 is personal property and assignable."

In the Allen Laughlin case, 31 L. D. 256, *supra,* the Land Department held that a soldier's additional homestead right could only be divested by the act of the widow during her widowhood, or by assignment of his minor children during their minority, and that if not so divested the right would pass by will.

In the John H. Mason case, 41 L. D. 361, *supra,* the department held that the right vests in the soldier's widow subject to divestiture in case of her death or remarriage without having used or assigned it; "but upon passing to the minors the right becomes perfect and absolute in them, dependent upon no condition, qualification or liability of divestiture"; "had the Congress intended that the right should expire or lapse when not used during minority, such intent would have been expressed by appropriate words * * *. Had Congress intended that during minority only the minor children might appropriate and obtain all the benefits, it would not have used the words 'shall be entitled to all the benefits,' without clear expression indicating by limitation over to whom the right should go ultimately if they

did not appropriate it during minority, or that in such event it should lapse and determine."

In the Fidelo C. Sharp case, 35 L. D. 164, *supra,* the department held that a soldier's additional right "is not a life interest only, but a part of the soldier's estate and may be devised by him subject to appropriation by the widow or minor children; if not so appropriated, the right vests absolutely in the devisee." "The estate is of necessity greater than a life estate, else he could not during his lifetime grant a greater estate and all his interest would fail at his death." In this case the soldier devised all his property to his widow; she devised all her property to Green; Green assigned to Sharp. "The entire interest is in the soldier and his estate at all times until divested according to the manner specified and by the persons designated in the statute. It follows, therefore, that such an interest is devisable."

In Earl C. Pound, 43 L. D. 205, *supra,* the department said:

> "It was a right lawfully initiated under the existing and applicable law of June 8, 1872, a right which the department and the courts now hold to have been a vendible and a transferable one, free of any restriction as to the character and nature of the land upon which it may be located, and a gift to the soldier in the nature of compensation for past services, vesting in him a property right. Such a right was acquired by Scott through his military service, and through his entry No. 8712, Booneville, Mo., for 80 acres."

In the case U. S. *ex rel.* Rule v. Lane, 42 Wash. Law Rep. 70, *supra,* the Supreme Court of the District of

Columbia, in an action brought against the Secretary of the Interior, held where a homestead entryman dies within six months after making his entry and without establishing residence on the land, his heirs may complete the entry by proof of cultivation and improvement for the necessary period and without the establishment of residence on the land, stating that in such a case the heir of the deceased entryman has a vested right in the land under the long-continued decisions of the Land Department and the Secretary of the Interior and the law as determined by the courts and under the statutes, of which vested right he cannot be deprived by the action of the Secretary of the Interior in reversing the decisions made by his predecessors in office; and a mandamus was issued requiring the secretary to grant a rehearing and reject a contest involving the rights in question.

**Administrative Ruling of February 15, 1917.**

Then came the administrative ruling of February 15, 1917 (46 L. D. 32), which held that a soldier's additional homestead right can be exercised only (1) by the soldier himself, directly, by entering the land, or indirectly, by conveying his right of entry during his lifetime to an assignee; (2) similarly by his widow, while her status as widow continues; (3) in the absence of appropriation by the soldier or his widow, then similarly by his minor orphan children, during their minority through their guardian; (4) unused as above the right lapses; it is not inheritable by the soldier's heirs, is not assignable by them or by the soldier's administrator, and does not become an asset of the soldier's estate.

The ruling is expressly confined to assignments of soldier's additional rights made subsequent to February 16, 1917; and assignments prior to that date are recognized as valid, though made by an administrator of the soldier's estate or by his heirs after they have reached majority.

Under this ruling therefore, the question whether a soldier's additional right is or is not property and inheritable as well as assignable, or whether it is a personal privilege, depends wholly upon whether an attempted assignment thereof is made before or after February 16, 1917; the statute is construed one way as to cases arising before that date, and in an opposite way as to cases arising thereafter.

It is certain that the Land Department is in error in one position or the other. The same statute cannot mean one thing today and another thing tomorrow.

The following inconsistencies are apparent in this ruling of the Interior Department:

(a) It recognizes the assignability of these powers, quoting Webster v. Luther, 163 U. S. 331. But according to all law and precedents a mere power cannot be assigned.

> "Nothing is assignable either in law or equity which does not involve a right to property. * * * Yet not all such rights are assignable, and a further test has been established, and is almost universally recognized, that rights which are purely personal and which die with the person, cannot be assigned no matter how acquired, but choses in action which survive as assets, or continue as liabilities, can be assigned."
>
> 2 Ruling Case Law, 595.

"Of course rights purely personal, which die with the person, cannot be assigned, no matter how acquired."

Haugen v. Sundreth, 106 Minn. 129.

"The criterion therefore by which to judge of the assignability of things in action is to ascertain whether the thing survives upon the decease of the party, or dies with him. Those in the first class are assignable, those in the second are not."

Erickson v. Brookings County etc., 18 L. R. A. 347.

(b) Another inconsistency is this: According to the department's theory a soldier can assign his right, the assignee may hold it until death, and the heir of the assignee will inherit the right; but if the soldier himself hold it until death, his heirs cannot inherit, if he left no minors. What justice in withholding from the heirs of the soldier what cannot be withheld from the heirs of the assignee of the soldier? But the fact is, that according to all law and precedents an assignor can assign no greater interest than he himself has. The mere act of assigning a power, if it were possible, surely could not operate to convert the power into a vested property right; yet that is exactly what the department says happens.

(c) Again, while not everything inheritable is assignable, *yet everything assignable is inheritable,* although the department says not. "Generally whatever will pass to an assignee or vendee will be cast by descent upon the heir." "So, too, vested estates whether realty or personalty, are descendible."

9 R. C. L. 64.

"Certainly what will pass to an assignee, or vendee, will be cast by descent upon the heir."

Herrod v. Meyers, 21 Ark. 592.

**Error of Administrative Ruling.**

The error of the administrative ruling is that it recognizes the letter of the law as enunciated in Webster v. Luther and other cases, but ignores its spirit and reasoning. If the additional homestead right is assignable because the right is "property", "an unfettered gift", it is for the same reason inheritable. If it is assignable because "it vested a property right in the donee", it is for the same reason inheritable. If it is assignable because "the grant of additional lands was without restrictions and consequently there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them in any mode he deemed proper or that might be adopted in respect to other property owned by him", it is for the same reason inheritable.

Under the general law it is personal rights only which are not assignable; such, for example, as torts for personal injuries, breaches of promise to marry, etc.

5 C. J. 850;
2 R. C. L. 595;
9 R. C. L. 64;
Herrod v. Meyers, 21 Ark. 592.

But if, as admitted by the department, a soldier's right is assignable by the soldier himself, by his widow and by his minor children through a guardian, then it

must be a property right and assignable also by the soldier's heirs or administrator.

In all jurisdictions all personal property is descendible.

18 C. J. 811, 878;
U. S. v. Jones, 236 U. S. 106;
North v. Graham, 235 Ill. 178, 126 Am. St. Rep. 189.

Whatever can be sold or assigned or can pass to an assignee or vendee will be cast by descent on the heirs.

Herrod v. Meyers, 21 Ark. 592;
9 R. C. L. 64.

The chief incidents of ownership are the right of possession and use and the right to sell, assign or transmit according to the desire of the owner.

32 Cyc. 675;
39 L. R. A. 116, 751;
35 Am. Dec. 72;
69 Am. Dec. 740.

**Stare Decisis.**

But no matter whether all former decisions were right or wrong, is it now competent or possible for the secretary to reverse former decisions and overturn a rule of property of such long standing?

After repeated decisions for many years with none to the contrary, a rule of property becomes established and by virtue of *stare decisis* it is incompetent for the courts or departments to change the rule.

Art. V and XIV, Const. U. S.;
15 C. J. 915;

U. S. v. Alabama R. R. Co., 142 U. S. 615;
Barnes v. Poirier, 27 U. S. App. 501 (C. C. A. 8th);
Lonstorf v. Lonstorf, 118 Wis. 159;
Ferris v. Carter, 11 Cal. 175;
Hasket v. Maxkey, 134 Ind. 182, 19 L. R. A. 379;
Fisher v. Horicon, 10 Wis. 293, 27 Am. Rep. 55.

It was held in U. S. v. Alabama R. R. Co., *supra,* that the Federal Supreme Court will lean in favor of the construction given to the statute by the department charged with the execution of such statute, "and if such construction be acted upon for a number of years will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that the construction of a statute favorable to the individual citizen should be changed in such a manner as to become retroactive."

In U. S. *ex rel.* Rule v. Lane, 42 Wash. Law Rep. 70, the court says:

> "The heir of deceased entryman under the long continued decisions of the department and Secretary of the Interior, and the law as determined by the courts, has a vested right in the land, and he cannot be deprived of such right by the Secretary of the Interior reversing the decision of his predecessors in office."

> "The question whether bonuses were to be included in royalties is a matter of statutory construction, not finally entrusted to the discretion of the secretary but determinable in court, at the instance of the beneficiaries, as of right.
>
> Works v. U. S. *ex rel.* Mosier, 261 U. S. 352, 67 Law Ed. 693.

If Judge Sanborn's remarks in Barnes v. Poirier were pertinent in 1894, how much more so are they now, after more than 20 years have elapsed since they were made, during which time a vastly larger number of soldiers' rights have been exercised under the sanction of many additional decisions, not alone of the courts but of the Land Department also?

> "This course of judicial decisions ought not to be reversed and titles to the lands conveyed on the faith of it ought not to be disturbed and the inevitable litigation concerning them that must follow such a reversal ought not to be invited unless the decisions to which we have referred were clearly erroneous. In such case it is sometimes more important that the law should be settled and certain than that it should be technically right."
>
> Barnes v. Poirier, 27 U. S. App. 501, 64 Fed. 14 (C. C. A. 8th).

In conclusion, we believe it is most pertinent to emphasize this important observation:

If the Supreme Court answers the question of the Circuit Court of Appeals in the affirmative, upholding Secretary Lane's ruling, and construes the statute to confer a power only, it will destroy utterly the value of the right to soldier, widow, or heirs, for none would ever care to make use of it; it will accomplish no good, and may do infinite harm. It would have the effect of upsetting and nullifying title to hundreds of thousands of acres of land which have been located during the last decade or so with soldier heir scrip, and possibly all soldier scrip. It would also upset the patents to land on which several towns and villages are located, including

the town of Calipatria, California, and would inevitably cause endless litigation for many years to come. For if section 2306 U. S. Rev. Stats. is held now to mean that a power only was granted to the soldier, his widow, or his minor heirs, it must have meant that when the law was passed. The law cannot mean one thing today and something entirely different yesterday or tomorrow, according to the whim of some purely administrative officer; and if it grants only a power, then all scrip assigned by an administrator or adult heirs must be null and void; not only so, but all assignments of scrip by soldier, widow or minors are null; for, as has been heretofore shown, a *power* is inherent in the *person* and cannot be assigned; property only can be assigned.

On the other hand, it is safe to say that there is not now in existence more than 5000 to 10,000 acres of valid scrip left in the hands of soldiers' heirs or their assignees; and it is manifestly impossible for the remaining government lands to be appropriated to any appreciable extent by the use of such scrip, even if it were all used, which is entirely improbable; and the government could not possibly be injured thereby.

Therefore is it not a fair question to ask whether, even if the interpretation of the law has been wrong for the past thirty years, and even if all the courts and all the Secretaries of the Interior heretofore have uniformly interpreted it erroneously, is it competent for the Supreme Court to reverse these decisions? And if it is competent, would it be wise, thus bringing infinite harm to a great many innocent people and in reality taking away their property without process of law? Would it

not be much better to uphold the courts' former decisions upon the doctrine of *stare decisis* and upon the theory that a rule of property having been definitely established for a great many years it should not now be overturned, especially when no one, including the government, could be harmed thereby?

NORMAN T. MASON,

*Attorney for Appellee.*

803 Union Bank Bldg., Los Angeles, Cal.

# SUPREME COURT OF THE UNITED STATES.

No. 331.—October Term, 1925.

Clarence A. Anderson, *vs.* James W. Clune. } On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[November 16, 1925.]

Mr. Justice Sutherland delivered the opinion of the Court.

In 1872, A. K. Johnson, an honorably discharged soldier of the Civil War, made a homestead entry of 80 acres. He died in 1875, leaving a widow, who died in 1917, neither having disposed of the husband's additional homestead right. Johnson also left four children, all over the age of 21 years at the date of the death of the widow; and they, together with the widow of a deceased son, sold and assigned the right to one Mason who sold and assigned it to the extent of 20.49 acres to Clune. By virtue of the latter assignment, Clune entered a tract of public lands in the United States Land Office in California; but the entry was rejected by the General Land Office on the ground that "the assignment of the soldier's additional homestead right had not been made by the soldier or his widow or his heirs prior to the administrative ruling of the Department of the Interior February 15, 1917, (46 L. D. 32) and rulings and decisions of the Land Office, which construed sections 2306 and 2307 of the Revised Statutes as limiting a soldier's additional homestead right to the exercise thereof (1) by the soldier himself entering the land, or indirectly by conveying his right to entry to an assignee during his lifetime; (2) by the widow while her status as widow of the soldier continued; (3) in the absence of appropriation by the soldier or his widow, then by the minor orphan children during their minority acting through their guardian." In October, 1923, Anderson entered the lands in controversy under an assignment of the additional soldier's homestead right of one Dunn, and patent issued to him therefor. Anderson's entry was made with full knowledge that Clune had made prior entry thereof, under which he was claiming the land. Alleging

these facts, suit was brought by Clune against Anderson to have it adjudged that the latter held the lands in trust for the former. The trial court overruled a motion to dismiss the bill and rendered a decree in favor of Clune. An appeal followed to the circuit court of appeals and that court has certified (Judicial Code § 239) the following question upon which instruction is desired:

"Under the Revised Statutes of the United States, sections 2306 and 2307, is a soldier's additional homestead right limited to the exercise thereof by the soldier himself entering the land, or indirectly by transfer of his right to an assignee during his lifetime, and to his widow while her status as widow of the soldier continues, and in the absence of the appropriation by the soldier or his widow during their lives, then by his minor orphan children during their minority acting through a guardian?"

By § 2304 R. S., Johnson was given the right to enter and receive patent for 160 acres of public lands subject to homestead entry. Having entered only 80 acres, he became entitled to the benefits conferred by § 2306 R. S., which provides that every person entitled under the provisions of § 2304 to enter a homestead, who may have entered a quantity of land less than 160 acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." Section 2307 R. S. provides:

"In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; . . ."

It was held in *Webster* v. *Luther,* 163 U. S. 331, that Congress intended by § 2306 R. S. to vest a property right in the donee as a sort of compensation for his failure under § 2304 to obtain the full quota of 160 acres; that residence on or cultivation of the lands to be taken was not required as in the case of the original homestead entry; and that it was immaterial to the government whether the original donee should exercise the right or should transfer it to another. And the property right thus vested was held to be assignable. The rulings of the Land Office prior to this decision had been that the right was essentially personal

and non-assignable,—to be exercised only by the original donee or his widow or his minor orphan children through a guardian. After the decision, the rulings of the department were uniformly to the effect that the right not only was assignable, but inheritable; that in case a soldier entitled to the right died without exercising it, leaving no widow or minor orphan children, the right to entry vested in his personal representatives, *Williford Jenkins,* 29 L. D. 510; *Fidelo C. Sharp,* 35 L. D. 164, and other cases; but, if the right passed to the minor children, it became absolute in them, in no way conditioned upon an appropriation by the guardian during their minority. *John H. Mason,* 41 L. D. 361.

This view was adhered to until 1917, when the Secretary of the Interior by an administrative ruling held that the right must be used by the soldier in his lifetime, either by entering the land or assigning the right, or by the widow while her status as such continued, or by the minor orphan children during their minority, acting through their lawful guardian; and that if not exercised as thus indicated the right lapsed and ceased to exist. The officers of the land department were expressly instructed that no soldier's additional right assigned by the heirs or administrator of the estate of a deceased soldier or of his widow, or of his minor orphan children, or directly by such "minor children" after they had reached majority, should be recognized as a basis for the entry of public land. 46 L. D. 32. In a subsequent letter reviewing these instructions, 46 L. D. 274, 275, the Secretary of the Interior said: "The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property, and convertible into specific land by entry under it."

This is plainly in the face of the decision of this Court in *Webster* v. *Luther, supra.* See also, *Mullen* v. *Wine,* 26 Fed. 206; *Barnes* v. *Poirier,* 64 Fed. 14, 18. The grant of the statute (§ 2306), *ipso jure,* vests a property right in the donee which he may exercise or sell and transfer. A property right, the ownership of which may be conveyed to and vested in a purchaser, must be accorded the quality of inheritability, which usually attaches as an incident of ownership, in the absence of some provision of law to the con-

trary; and we, therefore, hold that the soldier's additional homestead right, if not exercised or transferred by the donee, passes to his estate as other property, subject only to the exercise of the rights given by § 2307 to the widow and minor orphan children.

*The question certified is answered in the negative.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*